# STATE OF MICHIGAN

# COURT OF APPEALS

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DR. KENNETH BROWN and KATHERINE ANNE THOMPSON,

Plaintiffs-Appellants,

v

DR. KAREN MILNER,

Defendant,

and

DR. DAN ANDREWS and UNIVERSITY HEALTH SERVICES,

Defendants-Appellees.

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UNPUBLISHED
July 3, 2007

No. 274490
Washtenaw Circuit Court
LC No. 06-000142-CH

Before: Talbot, P.J., and Cavanagh and Meter, JJ.

Talbot, J. (*concurring in part and dissenting in part).*

I find it necessary to dissent from the majority's determination that the trial court abused its discretion in denying "plaintiff's request to amend." Specifically, the majority states in its opinion that "the trial court affirmed its decision to dismiss defendants Dr. Andrews and University Health Center when it denied plaintiff's request to amend his complaint and his motion for relief from judgment." However, contrary to this statement, plaintiff failed to seek amendment, proffer an amended complaint, or identify with specificity the manner in which he would amend his complaint to state a viable cause of action in the trial court. In fact, plaintiff acknowledged at the hearing on his motion for reconsideration that "I have not asked here today, for permission to amend [the complaint]," deferring the filing of a motion for amendment to "a later time."

Nevertheless, I reluctantly concur with the decision to remand this matter to the trial court in order to permit plaintiff the opportunity to amend his pleadings. Although MCR 2.118(A)(2) provides that leave to amend a pleading "shall be freely given when justice so requires," an amendment need not be granted if it would be futile. *Manuel v Gill*, 270 Mich App 355, 381-382; 716 NW2d 291 (2006). Despite harboring serious doubt, based on the facts presented to date, that plaintiff will be able to plead a sufficient cause of action, I must concur in the decision to remand based on defendants' statement, in response to the motion for

reconsideration, which implied that amendment may not be futile as "plaintiffs could have claimed malpractice for treatment provided during the two years before they filed their notice of intent." While lacking specificity, defendants' statement suggests that plaintiff may be able to amend his complaint to demonstrate that a subsequent treatment interaction with Dr. Andrews could comprise a separate act or omission triggering a new accrual date. See *McKiney v Clayman*, 237 Mich App 198, 204; 602 NW2d 612 (1999). Because this statement is unclear by failing to elucidate how the existence of a later treatment date in plaintiff's ongoing relationship with Dr. Andrews would impact the viability of plaintiff's claim, it becomes necessary to extend plaintiff an opportunity to clearly and specifically plead facts sufficient to establish a cause of action.

I state emphatically that my agreement to remand is not intended to imply that I find any merit to plaintiff's claims or to suggest that inclusion of the later treatment date demonstrates anything other than "continuously adhered to diagnosis and treatment," as opposed to a separate act of malpractice triggering a new accrual date. *Id.* at 204 n 4. Rather, I believe that remand in this matter merely serves a procedural function, which will ultimately result only in the prolongation of litigation and further expense to the parties.

/s/ Michael J. Talbot